United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original

To be argued by
STANLEY L. KANTOR

75-7121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MIRIAM WINTERS,

Plaintiff-Appellant,

-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; Doctors H. Blankfeld, Dusan Kosovic, Sandra Grant, Gerald Grant, Gerald Ollins, Christine Jordan, Thomas DaCorta and Catherine Dromgoole and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

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BRIEF FOR STATE DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS
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MIRIAM WINTERS,

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Doctors H. Blankfeld, Dusan Kosovic, Sandra Grant, Gerald Grant, Gerald Ollins, Christine Jordan, Thomas DaCorta and Catherine Dromgoole and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

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BRIEF FOR STATE DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff, a former patient at Central Islip State Hospital, a facility operated by the New York State Department of Mental Hygiene, has appealed from an order of the United

States District Court for the Eastern District of New York (Judd, D.J.) dated December 13, 1974, insofar as it failed to reopen the instant matter as to three of the named defendants: Alan D. Miller, M.D., both individually and in his capacity as Commissioner of the New York State Department of Mental Hygiene and Gerald Ollins, M.D., a doctor on the staff of Bellevue Hospital, and Alexander Thomas, M.D., individually and as Director of the Psychiatric Center, Bellevue Hospital Center. The order was entered December 17, 1974. On January 13, 1975, plaintiff appealed from the December 13, order.

Question Presented

Did the District Court abuse its discretion in refusing to reopen a matter, five years old, as to a defendant where the record is devoid of any evidence tending to show that said defendant performed any act with regard to plaintiff or participated in any decision regarding plaintiff, and where defendant was possessed of a qualified immunity?

Statement of the Case

On July 3, 1969, plaintiff, a former patient at the Central Islip State Hospital, commenced an action against, inter alia Alan D. Miller, M.D., then Commissioner of the New

York State Department of Mental Hygiene.* The complaint, as filed on July 3, 1969, requested five specific modes of relief in the ad damnum clause, including a claim for $50,000 against all defendants. In identifying the parties, defendant Miller is identified only as the Commissioner of Mental Hygiene of the State of New York (Compl. ¶ 4). In addition the complaint names as parties (Compl. ¶ 7):

> "There are other defendants, whose names are not presently known to plaintiff, all of whom are doctors on the staff of Bellevue or Central Islip who administered involuntary physical treatments to plaintiff."

The complaint set forth three claims which in sum and substance, allege that plaintiff during the period of time she was at Bellevue as an involuntary patient (May 2, 1968 - May 13, 1968) and at Central Islip (May 13, 1968 to June 18, 1968) and a voluntary patient at Central Islip (June 18, 1968 to July 18, 1968) medical treatment was administered to her by the Doctors there over her objections and clearly stated religious beliefs, causing her "great emotional and mental anguish, pain and suffering, indignity and humiliation and physical illness". As a second cause of action, she alleged that she had not been judicially declared to be incompetent, and therefore was competent to make a determination as to whether or not to receive

* Commissioner Miller has since resigned his position.

medical treatment. Finally, she alleged that involuntary fingerprinting and photographing over her objections violated her civil rights and also caused her great emotional and mental anguish, pain and suffering, and indignity and humiliation.

By motions dated September 12, 1969, the named defendants then, including defendant Miller, moved to dismiss the complaint on grounds of lack of jurisdiction and failure to state a claim for which relief can be granted. On November 21, 1969 the District Court (Travia, D.J.) rendered an opinion on cross-motions for summary judgment,* dismissing the complaint in all respects. The opinion upon which the dismissal was granted is reported in 306 F. Supp. 1158.

An appeal was taken to this Court from Judge Travia's order, which on May 26, 1971, reversed, over the dissent of Judge Moore, the decision of the District Court and "remanded for further proceedings as to the claim for damages resulting from forced medication in violation of the plaintiff's right to freedom of religion under the First Amendment". This opinion is reported at 446 F. 2d 65. A petition for certiorari was denied. 404 U.S. 984 (1971).

Subsequently, discovery and pre-trial proceedings began. Upon request of defendants and over plaintiff's

* Pursuant to Rules 12(b) and 56, F.R. Civ. P., defendants motions to dismiss were converted to motions for summary judgment.

objections, the District Court ordered plaintiff to submit, pursuant to Rule 35, F.R. Civ. P., to a physical and medical examination. Thereafter plaintiff sought a writ of mandamus from this Court prohibiting the examination, which writ was, on April 1, 1975, granted, and again the matter was remanded to the District Court. This decision is reported in 495 F. 2d 839.

On June 5, 1974, the Court (Judd, D.J.) held a pre-trial conference, resulting in the scheduling of depositions and setting a date for trial, November 4, 1974. On November 1, 1974, the deposition transcripts not having been received from the reporting service, one of plaintiff's counsel contacted the District Court, and informed the court of the problem, and received the impression from the Clerk for Judge Judd that the matter would be rescheduled, and communicated this fact to defendants' counsel. Nevertheless, on the morning of November 4, 1974, Judge Judd, who had not in fact agreed to the adjournment of the matter, had the matter on the calendar. As plaintiff's counsel and counsel for the State defendants had not appeared, the matter was put over for the afternoon of that day, all counsel were apprised of Judge Judd's order and counsel appeared in the afternoon. At that time all counsel engaged in a colloquy in which plaintiff, in part was ordered to proceed to select a jury which plaintiff's counsel refused to do, and in which defendants set forth certain defenses, including the

defense of official immunity as applied to defendants Miller and O'Neill. Because plaintiff refused to proceed to select a jury on November 4, intending to start the trial proper on November 5, 1974, the District Court refused to consider reopening the matter, and ordered the action dismissed.

A month later, plaintiff again moved to reopen the matter based based apparently on Rule 60(b) F.R. Civ. P., setting forth, in part, the transactions leading up to and culminating in the dismissal order. On December 13, 1974 the District Court (Judd, D.J.) issued an order reopening the case, except as to defendants Miller, Thomas and Ollins.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REOPEN AS TO THE STATE COMMISSIONER OF MENTAL HYGIENE, A DAMAGES ACTION INVOLVING PURPORTED VIOLATIONS ALLEGEDLY COMMITTED WITHOUT HIS KNOWLEDGE BY TREATMENT PERSONNEL AT A STATE HOSPITAL.

Relief from the effect of judgments, as articulated in Rule 60(b), F.R. Civ. P., represents a careful balancing, inherent within the court's power, between the desire that cases be decided on the merits and not on defaults, and principle that final judgments should not be disturbed without good and sufficient cause. Such motions are directed to the discretion

of the court. While mistake, inadvertance and excusable neglect constitute cause to vacate a judgment, the principles of equity to which such motion is addressed require, as in motions to reopen defaults, that the moving party demonstrate that he or she has a viable, provable claim and that no prejudice to the party in whose favor the judgment was granted. Redac Project 6426, Inc. v. Allstate Insurance Co., 412 F. 2d 1043 (2d Cir. 1969); Bankers Mortgage Co. v. United States, 423 F. 2d 73 (5th Cir. 1970), cert. den. 399 U.S. 927 (1971); Altman v. Connally, 456 F. 2d 1114 (2d Cir. (1972); Beshear v. Weinzapfel, 474 F. 2d 127 (7th Cir. 1973).

Unlike a motion addressed to the sufficiency of the complaint under Rule 12(b) or for summary judgment under Rule 56, in which the issue is whether the party opposing the motion can prove any state of facts showing entitling them to proceed to a trial on the merits [See, e.g. Conley v. Gibson, 355 U.S. 41, 45-46 (1957)], the burden is on the moving party to show that such is not the case. In contrast, in a motion seeking relief from a judgment, the burden is on the moving party to show a legitimate, provable claim that warrants a hearing on the merits.*

Appellant asserts that such legitimate claim finds its source in the prior disposition of this Court on appeal from

* It is this shift in the burden that appellant fails to take cognizance of on this appeal.

the Eastern District's summary judgment order dismissing the complaint. Appellant asserts, apparently relying on "the law of the case" (Appellant's Br. at 9) that the questions of official immunity and whether defendant Miller is liable at all, have already been decided and therefore constitute "law of the case" and the District Court erred in considering Commissioner Miller's removal from the situation as insulating him from a claim for damages, as well as his official status immunizing him from such a claim.

In the original decision, Judge Travia rejected defendant Thomas' claim to official immunity and stated, misconceiving the nature of the doctrine that "[o]fficials of state and city hospital systems have specifically been held to have no immunity in suits brought under 42 U.S.C.A. [sic] § 1983 in at least two Second Circuit cases, Birnbaum v. Trussell, 347 F. 2d 86 (2d Cir. 1965) and Jobson v. Henne, 355 F. 2d 129 (2d Cir. 1966)".* As Judge Travia's ultimate decision was to the effect

* In Birnbaum, this Court had occasion to consider the legality of a claim by the Commissioner of the New York City Department of Hospitals to official immunity as a defense to a violation or conspiracy to violate a former employee's civil rights in a discrimination case. The Court held, in a decision that has lost its vitality under Scheuer v. Rhodes, 416 U.S. 232 (1974) that it was no defense to suits under the the civil rights act to claim official immunity. To the extent that official immunity was in that action, claimed to be an absolute privilege rather than a qualified one, such is, of course, still the law, but appellant does not restrict herself even to that, but rather, urges that it is not available at all. In Jobson, an action for damages was alleged against a director, two assistant directors, and a supervising

*Footnote Continued from Previous Page

psychiatrist who caused plaintiff to engage in involuntary servitude and peonage. The Court held that the doctrine of official immunity was not available under the circumstances of that case.

complaint failed to state a claim, defendants had no occasion to appeal the ruling on the official immunity issue and thus it was never before this Court on the initial appeal.* Moreover, an examination of the briefs filed by plaintiffs and state defendants indicate that the issue was not presented there, nor was it specifically addressed in either the majority or the dissenting opinions.** It can thus hardly be gainsaid that the law of the case is such that such a defense is precluded, and would not in fact serve as a rational basis for the Court's decision, thereby precluding a finding of abuse of discretion. See e.g. Class v. Norton, 505 F. 2d 123, 127-8 (2d Cir. 1974).

To the extent that the issue was raised on the petition for certiorari and to the extent that appellant relies on the denial of certiorari by the Supreme Court, to preclude the issue, appellant misstates both the law and facts.*** It is now too

* Even if the District Judge had in fact not ruled in defendants favor but merely denied the motion to dismiss and directed trial, it is doubtful that jurisdiction would have lain in this Court to review the denial as it would not have been a final judgment nor an appealable interlocutory order. See 28 U.S.C. §§ 1291, 1292.

** See appendices A-C, post. Judge Moore's dissent, however, deals in part with the question of the liability under the respondeat superior doctrine. 446 F. 2d at 72-73.

***Indeed, in her brief in opposition to the petition for certiorari, appellant argues that "This Court should not consider the applicability of the doctrine of respondeat superior to the facts of this case because that question is premature, and was not raised, briefed or argued in either of

***Footnote Continued from Previous Page

the Courts below." (Br. Opp to Cert. p. 12) Thus, it is indeed strange for appellant to have argued then that the question was never before the Court, and now to infer that the denial of certiorari precludes the issue as a ground for sustaining the District Court's opinion.

well settled to be susceptible of debate that a denial of a petition for a writ of certiorari is not a disposition, on the merits or otherwise, and establishes no rule of law.* Parker v. Ellis, 362 U.S. 574 (1960); Griffin v. United States, 336 U.S. 704 (1949). Indeed, where a case is remanded by a court of appeals, the lack of finality is sufficient, in and of itself, except in the most extraordinary of cases, to lead to a denial of certiorari. Hamilton-Brown Shoe Co. v. United States, 240 U.S. 251 (1916); Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967); See Stern & Gressman, Supreme Court Practice, at 180 (4th Ed., 1969). It follows therefore, that a denial of certiorari does not later preclude a subsequent grant of certiorari or appeal where the case is ripe for review. Consequently, appellant's "law of the case" argument must fail, for as Judge Moore noted previously in this case (446 F. 2d at 73):

> "The majority concludes 'that the appellants has stated a claim for which relief may be granted' and thus

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* A denial of a writ of certiorari must thus be distinguished from other summary action by the Supreme Court. A "4-4 affirmance" while not a disposition "on the merits" does end the action between the parties, while being of no precedental value. See Neil v. Biggers, 409 U.S. 188, 190-192 (1972); U.S. ex rel. Radich v. Criminal Court, 459 F. 2d 745 (2d Cir. 1972), cert. den. sub nom. Ross v. Radich, 409 U.S. 1115 (1973). While not without some difficulty, a summary affirmance or dismissal on appeal is, under the law of this Court, a disposition on the merits binding on the parties and entitled to precedental weight. Mercado v. Rockefeller, 502 F. 2d 666, 673 (2d Cir. 1974), cert. den. sub nom. Mercado v. Carey, ___ U.S. ___, 45 U.S.L.W. 3452 (2/18/75).

> 'remand[s] the case to the district court with instructions that it proceed to trial on the merits'. Based on the foregoing analysis, and barring any new evidence indicating injunctive or declaratory relief may be appropriate, the district court may well conclude that no relief whatever is appropriate."

So that District Court has. At least as to defendant Miller, that such a decision is not an abuse of discretion is clear, and should be allowed to stand.

Appellant's reliance on Dale v. Hahn, 440 F. 2d 633 (2d Cir. 1971) is misplaced. In that case, relying on the now disavowed notion that official immunity should be "sparingly applied", the Court dealt with the issue and found an absence of official immunity. Even assuming, arguendo, that the decision is a viable one on its face, it does not advance appellant here. The Court wrote (440 F. 2d at 638):

> "While we do not intimate any opinion as to defendants' immunity in a case where consequential or punitive damages are sought, we do hold the defendants are not immune from a suit for compensatory damages to the extent that they have expended plaintiff's assets. This lack of immunity should not seriously hamper the diligent administration of New York's Mental Hygiene Law, the latter factor being a consideration which in our estimation does not outweigh the policy of the Civil Rights Act."* [Emphasis added].

* In Dale, the plaintiff sought return of property wrongfully taken, a situation entirely distinct from the instant one. As a result of the drugs, plaintiff suffered no loss of earnings.

Compare Scheuer v. Rhodes, supra and Wood v. Strickland, ___ U.S. ___, 43 U.S.L.W. 4293 (2/25/75). It should be noted that Wood is limited by its very terms to school board members, but even there the Court established that immunity is of no avail only if:

> "The school board members acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."*

Under the facts in this case, particularly the undisputed fact that Commissioner Miller was unaware of plaintiff, of her placement in Central Islip State Hospital, the treatment given her, that the treatment given her was over her stated objection, or that her objection was based on her belief as a Christian Scientist, it would be a strange theory indeed not to find that his actions were not in good faith, and it would be equally strange to find any malfeasance on his part toward

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* If we are to take a page from Goosby v. Osser, 409 U.S. 512 (1973) "clearly established" must mean resulting from prior decisions of the Supreme Court as to leave no doubt. See, e.g. Ex Parte Poresky, 290 U.S. 30 (1933); Hagans v. Lavine, 415 U.S. 528 (1974). Certainly, in this case, at the time of commission of the acts giving rise to the claims, such law was not well settled or clearly defined, nor is it yet. Indeed the configuration of the case is that two judges (Travia, D.J. and Moore, C.J.) opined that no rights were violated and two (Smith and Anderson), C.JJ.) opined that they were.

plaintiff sufficient to impose personal liability. Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1970); Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Johnson v. Glick, 481 F. 2d 1028, 1034 (2d Cir. 1973). In Boettger v. Moore, 483 F. 2d 86, 87 (9th Cir. 1973), the Court pointed out the rationale for the inapplicablity of the respondeat superior doctrine. It correctly noted that "lower officials are not the employees of the higher officials; both are fellow servants of the City, an immune governmental agency". So it is here, appellant seeks to hold personally liable, a state official, whc has not deprived her of her constitutional rights, merely has operated a large, and complex department. Surely a rule of law that would subject an agency head to personal liability merely because of his status would be an extraordinary one indeed, sound neither in principle nor law.

CONCLUSION

THIS DECISION OF THE COURT
BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
April 22, 1975

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 34521

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Appellant,

against

ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Respondents.

BRIEF FOR RESPONDENTS MILLER AND O'NEILL

Statement

This is an appeal from a decision and order of the United States District Court for the Eastern District of New York (TRAVIA, J.) dated November 25, 1969, which denied appellant's motions for the convening of a three-judge statutory court pursuant to 28 U.S.C. § 2281 *et seq.* to detemine the constitutionality of § 34, subd. 9-a of the New York State Mental Hygiene Law and for summary judgment and granted the motions of the respondents dismissing all claims in the complaint.

Statutes Involved

New York Mental Hygiene Law, § 34(9-a):

"Upon admission of a person, sixteen years of age or over, to any institution in the department as a patient therein, and if the condition of such person so permits, the director shall cause him to be photographed and shall cause impressions of his fingerpints to be made in duplicate. The photograph thus taken and one copy of the fingerprints shall be retained at the institution and shall not be made available to any person except with the consent of the commissioner or upon an order of a court of record after due notice given to the institution. A duplicate copy of such fingerprints shall be forwarded promptly to the Albany office of the department for appropriate filing therein, subject to regulations established by the commissioner, or with any other state agency maintaining a central fingerprint file."

Questions Presented

1. Was the Court below correct in holding that the treatment administered to appellant at a state mental hospital did not violate her First Amendment rights?

2. Was the Court below correct in holding that appellant's complaint against a New York statute providing for photographing and fingerprinting of patients in state mental hospitals did not present a substantial federal question?

Facts

Since the decision of the District Court reported at 306 F. Supp. 1158 (E.D.N.Y. 1969), as well as the affidavit of Dr. Bertram Pepper, an Associate Commissioner of the De-

partment of Mental Hygiene of the State of New York (Appendix 24a-34a) presents a thorough statement of this case, only a brief summary of facts is in order.

Appellant alleges that she is a Christian Scientist. According to hospital records (copies of which are annexed to the Appendix), appellant was initially brought from her hotel room to Bellevue Hospital on May 2, 1968, by New York City police acting on a complaint from a phychiatrist employed by the New York City Department of Social Services who stated that appellant:

> 'has been living in room for years not washing herself, demanding food in her room, writing letters to the Mayor's office, playing radio all night and refusing medical help." (Ap. 45a)

Appellant was admitted to Bellevue for emergency treatment pursuant to § 78 of the Mental Hygiene Law. On May 6, 1968, pursuant to statute, she was notified of her right to demand a hearing under § 72 of the Mental Hygiene Law (Ap. 92a).

Thereafter, on May 7, 1968, Drs. Sandra Grant and Gerald Ollins completed their examination of appellant and issued a two physicians' certificate pursuant to § 72 of the Mental Hygiene Law, certifying the fact that appellant was mentally ill and a proper subject for care and treatment in a State institution (Appendix 45a-47a). The certificate indicated, among other things, that appellant could possibly injure herself or others and was unable to take care of herself. The preliminary diagnosis was CSR (chronic schizophrenic)/paranoid type (Ap. 46a).

Accordingly, on May 13, 1968, appellant was transferred to Central Islip State Hospital (Ap. 91a) where she was again notified of her rights pursuant to § 72 of the Mental Hygiene Law (Ap. 94a). At Central Islip, appellant was treated for her mental illness, the most drastic form of treatment being the injection of medication. Since appel-

Appendix C
Brief for City Appellees

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TABLE OF AUTHORITIES

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 34521

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

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ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE THOMAS

Statement

The appeal is by plaintiff from the order of Judge ANTHONY J. TRAVIA in the above action dated and entered November 21, 1969 (137a).* The order dismissed the third cause of action on the ground of failure to state a sub-

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* All references unless otherwise indicated are to Appendix to Brief of Plaintiff-Appellant.

stantial federal claim upon which relief would be granted, and granted summary judgment dismissing all the other claims of the complaint (135a). The appellee Thomas is Director of the Psychiatric Division, Bellevue Hospital Center, and hence represented by the undersigned.

Statement of Issues for Review

The defendant-appellee Thomas has only to do with part of Issue No. 1 stated in the brief of appellant (p. 1), the part that relates to matters that transpired at Bellevue Hospital. He has nothing to do with what may or may not have transpired at Central Islip State Hospital. It follows, also, that appellee Thomas has nothing to do with Issue No. 2 in appellant's brief (p. 2).

For the purposes of this appeal we accept Issue No. 1 as the issue applicable to appellee Thomas.

Facts

On the afternoon of May 2, 1968, appellant was taken from her room in the King Edward Hotel in Manhattan to Bellevue Hospital, on the authority of New York City police officers (17a).

According to the admitting physician at Bellevue, Dr. Blankfeld, appellant told him that she was "being framed by people at the head" (17a) and that, "They want to get me out of the room" (*ibid.*). Appellant also advised Dr. Blankfeld that she once had been admitted to Kings County Hospital, Psychiatric Division (*ibid.*).

Dr. Blankfeld stated that appellant, "was evasive, guarded, suspicious and negativistic. She spoke under pressure, her communications were tangential, irrelevant

and illogical. She had delusions of persecution and grandeur but denied hallucinations as well as suicidal and homicidal ideation." She was diagnosed by him as "Chronic Schizophrenic Reaction, Paranoid Type" (17a-18a).

On the day of her admission, appellant was also seen by one of the Bellevue staff psychiatrists, Dr. Dusan Kosovic, who interviewed her extensively and reached the same diagnosis as had Dr. Blankfeld (18a).

There is no note in the Bellevue hospital record which would indicate that patient made any statements to the effect of her being a Christian Scientist except a statement she made on the day of admission in the admitting office to one of the Bellevue social workers (18a, 22a).

Appellant was admitted to Bellevue for emergency treatment pursuant to Mental Hygiene Law Section 78. The admitting physician asked to take her blood pressure, but she refused to permit this (39a).

A picture of appellant as she had appeared on March 21, 1968, to Dr. Robert Reich, Psychiatric Consultant for the City Department of Welfare, is contained in a letter written by Dr. Reich to the Admitting Psychiatrist at Kings County Hospital five or six weeks before appellant was brought to Bellevue Hospital. It reads as follows (20a-21a):

> "Miss Miriam Winters of 55 Pierrepont Street, is a 58 year old woman, who is continuing to be disruptive in her hotel. She plays the radio all night and guards the public bathroom claiming it is her own. She has not washed in five years and her appearance is totally dirty and dishevelled. She has been unable to leave her room for some years and the hotel has been sending food to her room. She has refused medical help of any kind. She has been sending

letters to the Mayor's Committee demanding a room with a bath, but despite attempts by the department to help her move, she has been unable to leave the hotel room or to clean herself up so that she could be acceptable in a public hotel. There are no relatives who can help her and we feel that in her present condition she is a danger to herself in that if no food is brought to her she will starve, as well as her argumentative behavior and the guarding of the bathroom make it utterly impossible to live with others.

I would, therefore, recommend that she be sent to Kings County Hospital for evaluation and treatment of this chronic problem which has grown worse over the years."

On May 6, 1968, appellant was notified of her right to demand a hearing, and the Mental Health Information Service was also notified (31a). Thereafter, on May 7, 1968, Doctors Sandra Grant and Gerald Ollins completed their examination of appellant and issued a two physicians' certificate pursuant to Mental Hygiene Law § 72 certifying that appellant was mentally ill and a proper subject for care and treatment in an institution under the provisions of the Mental Hygiene Law (31a, 45a-47a). These physicians also certified as their diagnosis "Chronic Schizophrenic Reaction, Paranoid Type" ("CSR/paranoid type" (46a). They gave as their opinion that appellant showed a possible tendency to injure herself and also to injure others (*ibid.*).

Shortly thereafter, on May 10, 1968, and pursuant to Mental Hygiene Law § 72, an application for admission to Bellevue was made by Salvatore R. Cutolo, Assistant Hospital Administrator (31a).

At no time during her stay in Bellevue did appellant demand a hearing pursuant to Mental Hygiene Law § 72 (3) (31a).*

Appellant was at Bellevue from May 2, 1968, the date of her admission, to May 13, 1968, when she was transferred to Central Islip State Hospital and involuntarily committed there (8a). The sole medication received by appellant during the entire time of her stay in Bellevue is stated in the record, as follows (18a):

> "On the day of admission 50 mgs. of Thorazine (one of the tranquilizers) was given to patient intramuscularly. A 50 mg. Thorazine tablet to be given 4 times a day as well as Chloral hydrate (a mild sleeping medication) was also ordered. On May 3 the Thorazine medication was increased to 100 mgs. In addition to her Thorazine medication, on May 9 Stellazine, 10 mgs. 3 times a day (a tranquilizer) and Artane 2 mg. tablets twice a day (an anti-Parkinsonian drug) was ordered. The above medication was judged to be essential in order to control her mental illness."

Appellant was discharged from Central Islip Hospital on July 18, 1968 (9a, 32a). She has not since been hospitalized, being presently resident at the St. George Hotel, 51 Clark Street, Brooklyn (4a). The case, therefore, does not involve continued confinement or continued giving of medication. Appellant does not contest, and in fact concedes, that she was legally and properly committed (App. Br., pp. 17, 18).

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* At Central Islip Hospital on June 18, 1968, she asked to be converted to voluntary status (32a).

Opinion Below

The Court below held, insofar as its decision applies to the appellee Thomas, that the action was not moot since appellant still sought damages (111a); that the individual defendants enjoyed no immunity from suit (111a-112a); that a three-judge Court was not indicated since appellant sought not injunction but damages (112a-113a); that legality of the commitment and of the procedures used was conceded (112a); that in the case of a patient, such as appellant, who is brought in on an involuntary basis by police for emergency observation, care and treatment, the State owes a special responsibility to the patient and to the health and welfare of the people of the State (113a-114a); and that in this case appellant's rights under the First, Fourth, Fifth and Fourteenth Amendments had not been violated (120a-134a).

On this latter subject, the Court said (123a-127a):

> "Where the ability of the patient to choose his type of treatment is unquestioned, because his mental capacities have been unimpaired, he is allowed to choose the scope of the treatment, even to the extent of refusing medically necessary blood transfusion [cases cited].
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> • • •
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> "But a mental patient, because of the nature of the illness, may be unable either to seek appropriate treatment or to determine what treatment to allow. • • • On the other hand, where the mental patient is not properly treated, the condition may progressively worsen, and the patient may become a public burden and expense. Badly needed beds in mental hospitals may be occupied by those (few or many) who refuse treatment which competent and expert medical practi-

tioners prescribe. Where the proposed treatment is conducive or necessary for the cure or amelioration of mental illness, the failure to provide it would be a step backward in history of mental hygiene.

Who else is better qualified to give care and treatment than those in whom the State places its trust to care for and treat the mentally ill?

For those for whom advanced medical treatment is not provided the danger exists that a cure which might be effected would be lost. Mental institutions would potentially be limited to acting as custodians of those mentally ill persons, for their own safety and that of the public as was true in earlier periods of caring for the mentally ill. *Cf.* Marsh W. Breslin, Preface to McKinney's New York Mental Hygiene Law, 'History of Mental Hygiene Law,' xii-xiii. It was only gradually that it was recognized '* * * that insanity as such was a condition akin to a physical ailment and one in which care and cure were becoming the fundamental objects * * *' *Id.* at xiii. No longer is mere custody of the mentally ill person the primary aim of mental institutions. Instead, it is '* * * only a requisite and a device by which those who require treatment and care must be controlled and detained for their own benefit and for the benefit of the public in general. * * *' *Id.* at xiv. * * *.

Involuntary patients in mental institutions present special problems. As in the present case, they are frequently brought into the institution on an emergency basis. They are frequently severely mentally ill. Because of an intrusion on the public, either by disorderly conduct, *cf.* Mental Hygiene Law §78 (3), or by action which is a danger to the individual or to others, the patient may have to be brought in forcibly. To restore

the patient to his freedom or to retain him in custody without treating him properly would be a violation of the duty of the Department of Mental Hygiene to both that patient and the public. Without treatment, the patient's dangerousness or disorderliness is likely to continue unabated. In the present case, where there is an indication that the plaintiff's illness had been getting progressively worse, retaining her or allowing her out of the hospital without either curing her or acting to arrest the progression of the disease would be grossly improper. Faced with a patient who had a chronic schizophrenic reaction of a paranoiac type, and who was brought into the hospital by an emergency ambulance, the doctors had to act in accordance with their expertise in treating mental illness. As plaintiff's condition improved, and the immediate emergency subsided, appropriate treatment was still necessary to induce the improvement in the plaintiff's condition indicated in the records. For the doctors to have done less would have been a violation of their obligations to the people of New York to seek to cure mentally ill patients so that they will no longer be dangerous or disruptive to themselves, or to the public, and so that they will no longer occupy scarce space in public mental health institutions."

Applicable Statutes

MENTAL HYGIENE LAW:

§ 72. Admission on certificate of two physicians

1. The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment upon certificate or certificates of two examining physicians accompanied by an application for the admission of such person • • •.

2. The director shall cause written notice of such application to be given the person alleged to be mentally ill not later than five days, excluding Sunday and holidays, after such admission and such notice shall set forth such person's rights under the provisions of this section. At the same time such notice shall also be given to the mental health information service and personally or by mail to the nearest relative of the person alleged to be mentally ill other than the petitioner if there be any such person known to the director, and to as many as three additional persons if designated in writing by the person alleged to be mentally ill, to receive such notice.

3. If at any time prior to the expiration of sixty days from the date of admission of such patient, he • • • gives notice in writing of request for hearing on the question of need for hospitalization to the director, a hearing shall be held as herein provided.

§ 78. Certain admissions for immediate observation, care and treatment.

1. The director of any hospital (other than a licensed private institution) maintaining adequate staff

and facilities for the observation, examination, care and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive or retain therein as a patient for a period of thirty days any person alleged to be in need of immediate observation, care or treatment for mental illness.

2. If at any time after such admission a patient * * * gives notice in writing of the patient's desire to be released, or if prior to the expiration of such thirty-day period the director determines that the patient requires care and treatment in a hospital beyond such period and such patient does not agree to remain in such hospital or apply for admission to another hospital as a voluntary patient or an informal patient, an application for hospitalization made as provided in section seventy-two of this article, accompanied by the certificate or certificates of two examining physicians supporting the application shall be filed with a hospital. * * *

3. Any peace officer of the state or of a county, town, village and city maintaining a police department organized pursuant to the laws of this state may take into custody any person who appears to be mentally ill and is conducting himself in a manner which in a sane person would be disorderly, and may direct his removal or remove him to any hospital specified in subdivision one of this section or temporarily detain any such person in another safe and comfortable place pending his examination or admission to any such hospital.

ARGUMENT

The complaint insofar as it relates to the appellee Thomas (first and second causes of action only) was properly dismissed for failure to state a cause of action.

(1)

The complaint sought the convening of a three judge court; an order that the action might be pursued as a class action; the issuance of a declaratory judgment; the granting of a preliminary and a permanent injunction; and monetary damages.

On this appeal from the dismissal of the complaint, the appellant appears to urge that she is entitled to all of the relief sought in the complaint, but the arguments advanced do not appear to discuss the right to any specific form of relief.

At the outset, we shall treat briefly with some of the forms of relief sought in the complaint.

Class Action. That this is an inappropriate case for a class action is plain from appellant's brief. At page 15, it states:

> "She contends only that in the circumstances of this case, compulsory medication constituted an unjustified abridgement of her religious freedom."

At page 16, it says:

> "Properly understood, plaintiff's complaint may not be important to very many people. But it is important to her, * * *".

It would appear, therefore, that the appellant is suing as an individual, not as a member of a class. To bring a class action, the plaintiff must be a member of the class. *Carroll* v. *Assoc. Musicians, etc.*, 316 F. 2d 574 (2nd Cir., 1963).

The plaintiff does not make clear what class she seeks to represent. If the class is Christian Scientists who are presently confined, she is not a member of the class. If the class is Christian Scientists who have been previously confined, there is no basis for seeking the declaratory or injunctive relief sought in this class action. There is no justiciable issue, as we shall show, to sustain a declaratory judgment. There is no threatened action to be enjoined. And there is no basis for monetary damages on behalf of a class.

Declaratory Judgment. There is no justiciable issue. There is no existing controversy between the appellant and the appellee Thomas except as to appellant's right to recover alleged damages for past acts by Thomas.

Injunction. There is no threatened action by appellee Thomas which would form the basis for enjoining him from so acting.

Monetary Damages. It is questionable whether there is any basis for bringing this action in the federal courts solely for the purposes of recovering damages, particularly where the damages, if recovered, would be only nominal damages.

Appellant was in Bellevue from May 2 to May 13, 1968. During that period, she received care and treatment including the following: a tranquilizer (18a), a mild sleeping medication (*ibid.*), and an anti-Parkinsonian drug (19b). All these were judged by the medical authorities having charge of her case "to be essential in order to control her mental illness" (19a). On June 18, 1968, she applied at Central Islip State Hospital to be put on voluntary status (96a), and on July 18, 1968, she was discharged from that hospital (9a, 32a).

Appellant does not complain of any actual aftermath of injury resulting from the treatment of tranquilizers, sleep-

ing medication and anti-Parkinsonian drug given her while at Bellevue. It is clear that appellant's real grievance, if any, is an abstract and theoretical one and not one which (assuming her complaint were in the least warranted) would entitle her to recover any substantial damages, certainly not against the appellee Thomas.

(2)

The appellee Thomas, as Director of the Psychiatric Division, Bellevue Hospital, was perfectly justified in giving the treatment that he (or his Division or Hospital) did with reference to this mental patient admitted on an emergency basis pursuant to the provisions of Mental Hygiene Law, § 78.

The necessity for emergency treatment was clear on the basis of the facts and circumstances stated. Appellant was described by a competent psychiatrist, whose responsibility it was, as "in her present condition * * * a danger to herself * * * and utterly impossible to live with others." (20a-21a). She had first created a disturbance at the King Edward Hotel in Manhattan that necessitated the calling in of the police (7a). On being admitted to Bellevue, she had refused to permit her blood pressure to be taken (39a). She had been diagnosed by several psychiatrists, whose duty it was, as suffering from Chronic Schizophrenic Reaction, Paranoid Type (18a, 46a). The element of danger to herself and to others was stated (21a, 46a).

The situation with regard to involuntary patients, which is what appellant was at the time of her admission to Bellevue, was well expressed factually by Bertram Pepper, Associate Commissioner of the Department of Hygiene of the State in charge of the New York City Metropolitan Regional Office, and a Qualified Psychiatrist and licensed physician, as follows (25a-26a):

"With regard to involuntary patients, there is also an attempt to respect their scruples or beliefs against treatment, within reasonable limits. However, an involuntary patient, by virtue of his very status, is not considered capable of always knowing what type of treatment may be best for him. Many are brought into the hospital by the police for emergency observation, care or treatment pursuant to Section 78 of the Mental Hygiene Law. Others are committed pursuant to the certificate of two physicians' procedure outlined in Section 72 of the statute. In any event, nearly all of these involuntary patients are severely mentally ill and are in need of immediate care and treatment. The diminished capacity of the person so mentally ill as to require involuntary hospitalization may be particularly expressed by denial of illness, symptoms, or need for any or all, or specific kinds of treatment. In such condition, consent to administer medication is not and cannot feasibly be sought or received without significantly delaying the beginning of needed treatment. This matter was given considerable review and consideration by the N Y S Legislature at the time that the present admission laws were enacted."

(3)

Appellant's attack on alleged constitutional grounds is under the First, Fourth, Fifth and Fourteenth Amendments. But applicable to appellee Thomas (Bellevue) is only the First Amendment (Freedom of Religion), and the Fourteenth Amendment (insofar as it likewise protects Freedom of Religion).

The Fourth and Fifth Amendments, and the Fourteenth Amendment in other aspects, pertain only to the fingerprinting and photographing with which, as stated, appellee Thomas is not concerned.

FIRST AND FOURTEENTH AMENDMENTS

The claim here is that appellant, as a believer in Christian Science and based on the minimal medication administered to her in the 11-day period after commitment at Bellevue, has been interfered with in her right of free exercise of religion.

In the first place, no question arises here of Bellevue having inquired into and rejected the validity of appellant's religious belief. Cf. *United States* v. *Ballard*, 322 U.S. 78 (1944). The contention of appellant in this regard was well answered by the Court below in the following language (131a-132a):

> "• • • the doctors acted within the expertise of their medical training to effectuate the State's interest in treating and curing, as far as possible, the plaintiff's illness. Plaintiff's beliefs did not determine the scope of permitted actions by the defendants' agents nor did the defendants discriminate in any way against plaintiff because of her beliefs. It is not every act of State officials which happens to intrude on an individual's rights as protected by the Constitution which allows that individual to recover for that intrusion. When medical officials have acted in good faith to carry out their obligations to the State and its interests, without intentionally seeking to give a mentally ill patient a particular treatment just because it is objectionable to her on religious grounds, they may not be liable to that patient when the appropriate treatment has been given and the patient objects. Cf. *Pierson* v. *Ray*, 386 U.S. 547 (1967). Since in the present case no question arises as to the good faith of the medical authorities who treated plaintiff, this is such a case."

The controlling principles were recently stated in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in the following language (BRENNAN, J., pp. 402-403):

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such (cases). • • • On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislature restrictions' (cases). The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." (italics, the Court's).

Those principles were recently applied in *Applic. of President & Directors of Georgetown Col.*, 331 F. 2d 1000 (Cir., Dist. Col., 1964), reh. den. 331 F. 2d 1010 (1964), cert. den. 377 U.S. 978 (1965), which upheld the issuance of a Court order authorizing blood transfusions to a woman who had been unwilling on religious grounds to consent, where it appeared that the patient had wanted to live and where the transfusions were necessary to preserve the "status quo" of her life.

See also, *Braunfeld* v. *Brown*, 366 U.S. 599, 603-604 (1961); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *"Compulsory Medical Treatment: The State's Interest Re-evaluated."* 51 Minn. Law Rev. 293 (1966).

The treatment of tranquillizers, "mild" medication for sleeping (18a) and anti-Parkinsonian drug was administered to a patient in a medical institution who, as conceded by appellant (App. Br., pp. 17, 18), and found by

the Court (103a), was legally committed. Such commitment was for emergency treatment and on an involuntary basis (31a). Only subsequently was appellant's status converted at her own instance into a voluntary one (32a, 96a). The administering of such minimal medication amounted, under the circumstances, to the smallest possible inconvenience to the end that the City might protect its citizens (appellant, and possibly others), from injury.

The Court below correctly pointed out, moreover (109a), that as a patient in a mental institution under the Department of Mental Hygiene, appellant was under the jurisdiction and custody of the State Supreme Court, which had the responsibility "* * * for the safekeeping, support and maintenance * * * of the incompetent * * *." also, that the Court had the power to "appoint a committee of the person * * *. Mental Hygiene Law § 100." The Court further pointed out that such a committee could be appointed without a trial in a summary procedure under § 102(1) and (2), upon the showing that the person "* * * has been legally * * * admitted to an institution and is at the time a patient thereof * * *." Therefore, the Court stated (109a):

> "Since plaintiff could summarily have been found to be an incompetent, the lack of any formal competency finding has no effect on this litigation."

Appellant's argument in effect comes down to the contention that before she could be administered a tranquilizer, mild sleeping medication, or any other like drug there had to be a judicial finding that she was incompetent to make that decision for herself. As applied to a patient admitted to a mental institution for emergency treatment on an involuntary basis, the contention is seen to go counter to practicality as well as being legally without merit.

The Court below well summed up the situation in its opinion, as follows (128a-129a):

> "By a 'Notice of Application and Patient Admission,' dated May 6, 1968, plaintiff was informed of her right to seek the aid of the Mental Health Information Service. In the three months, during which she was confined as an involuntary patient, no appropriate application was made by, or on behalf of, the plaintiff in spite of the availability of the protections accorded under the Mental Hygiene Law and the procedures of the Mental Hygiene Department and particularly Mental Hygiene Law §§ 88 and 70(6), (7), which set up the New York Mental Health Information Service, a service created as a neutral advisor which could act independently to take care of patients, to help them with their problems and to seek the aid of the Court where necessary. Thus, the hospitals were left to their own discretion * * * in determining what treatment was required for plaintiff's condition."

Also (133a-134a):

> "No serious operation was ever conducted, nor was drastic treatment given. The only indication along these lines, as appears in the hospital records, is that the plaintiff was injected with certain medication. Under the circumstances the decisions of the doctors to utilize such treatment was well within the area of their competence. She was sick, as the immediate diagnosis showed, and in need of immediate help.
>
> Plaintiff's constitutional rights have not been violated by the defendants."

CONCLUSION

The order appealed from, insofar as it concerns and affects the appellee Thomas, should be affirmed, with costs.

September 14, 1970.

Respectfully submitted

J. Lee Rankin,
Corporation Counsel of
The City of New York,
Attorney for Defendant-Appellee
Thomas.

Stanley Buchsbaum,
Edmund B. Hennefeld,
of Counsel.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GLORIA KIRNON , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Defendants Appellees herein. On the 22nd day of April , 1975 , she served the annexed upon the following named person :

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Attorneys in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Gloria Kirnon
GLORIA KIRNON

Sworn to before me this
22nd day of April , 1975

Assistant Attorney General
of the State of New York